(1)

88-209

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

MARK AUTORINO
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

HUBERT J. SANTOS
Counsel of Record
51 Russ Street
Hartford, CT 06106
(203) 249-6548

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East Hartford, CT 06108
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QUESTION PRESENTED

1. Whether the trial court erred in denying Petitoner's motion to dismiss an information charging Petitioner with the crime of sexual assault in the third degree on the ground that the prosecution was barred by the Double Jeopardy Clause when the trial court had previously granted the state's motion for a mistrial on the ground that defense counsel had asked the alleged victim whether she had previously sought to obtain money from another male acquaintance by informing him that she was pregnant and needed an abortion in contravention of an agreement with the Court and prosecution that the question would not be asked until the Court ruled on its admissability out of the presence of the jury and when neither the trial court nor the Connecticut

Supreme Court ruled on the admissibility of the question asked of the alleged victim?

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NO._____

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the order for the Supreme Court for the state of

Connecticut entered in this proceeding on May 10, 1988. An order denying reargument was entered on June 13, 1988.

OPINION BELOW

The Connecticut Supreme Court issued its opinion affirming the trial court's order denying Petitioner's motion to dismiss on double jeopardy grounds on May 10, 1988 and that opinion is reported at 207 Conn. 403 (1988). On June 3, 1988, the Connecticut Supreme Court denied Petitioner's motion for reargument. Both the opinion and order are reprinted in Petitioner's appendix.

The trial court's oral opinion granting the State's motion declaring a mistrial was delivered on September 9, 1986 and is reprinted in the appendix. The trial court's oral opinion denying the

Petitioner's motion to dismiss was delivered on September 17, 1986 and is reprinted in Petitioner's appendix.

JURISDICTION

The order of the Connecticut Supreme Court denying reargument was rendered on June 3, 1988. The Petition for a writ of certiorari was filed within sixty (60) days of the order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice

put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On September 9, 1986, the Petitioner (hereinafter referred to as the "defendant") was brought to trial pursuant to an information charging him with Sexual Assault in the third degree, a Class D felony, in violation of Conn. Gen. Stat. Sec. 53a-72a. (Transcript, 9/9/86-II, at 4.) The charge arose from a complaint brought by Michelle Charbonneau of Suffield, Connecticut, who alleged in a statement to the Suffield police that, shortly after noon of July 4, 1985, at the invitation of the defendant, she went to his house to discuss arrangements for babysitting with his two children for the following weekend. (T., 9/9/86-II, at 25.) While she was in the defendant's house, the complainant alleged, the defendant offered her money and forced her

to submit to sexual contact over a thirty to forty minute period of time. (T., 9/9/86-II, at 26, 28-29.) Several weeks later, the complainant made the first of several statements to police concerning the incident. (T., 9/9/86-II, at 52-53.)

On June 17, 1986, the defendant, through counsel, filed with the court a Motion in Limine, with a supporting Memorandum of Law, seeking a ruling on the admissibility of certain evidence. The evidence sought to be introduced concerned (1) the alleged victim's false statements concerning her need for an abortion, made in order to extort money from certain individuals; (2) the alleged victim's past use of drugs and efforts to obtain drugs; (3) statements by the alleged victim that charges were made against this defendant in order to extort money from him. (Motion in Limine, June 17, 1986, with supporting Memorandum of Law.)

In a conference prior to the jury's being sworn on September 9, 1986, it was agreed by the court and both counsel that argument on the Motion in Limine was not appropriate until after the direct examination of the complainant had taken place, and that "the motion in limine should stand in abeyance at this time." (T., 9/9/86-I, at 6.)

Following the completion of the direct examination of the complainant, defendant's counsel began his cross-examination, (T., 9/9/86-II, at 55.) After some qustioning about the accuracy and completeness of her statements to the police about the incident, the examination turned to the subject of lying. (T., 9/9/86-III, at 2.) The complainant accused the defendant of lying to his wife. (Id.) She admitted that she had lied on occasion. (Id.) Counsel then

asked her if she knew Steven Gorman, and she said yes. (Id. at 3.) The following exchange took place:

> Q Did you ever tell Steven Gorman that you were pregnant and needed an abortion and needed money from him?
>
> MR. PAULDING: Objection, your Honor.
>
> MR. CLIFFORD: I claim it.
>
> MR. PAULDING: I'd ask the jury to be excused.
>
> MR. CLIFFORD: I claim it, your Honor.
>
> THE COURT: The jury may be excused.
>
> (The jury leaves the courtroom.)
>
> MR. PAULDING: At this time, the state moves for a mistrial on the basis that the state was previously informed that we were going to have some advanced notice of this . . . I think it's clear from the question itself whether or not your Honor permits an answer, that the question is unbelievably damaging,

> and the state moves for a mistrial at this time.
>
> MR. CLIFFORD: Your Honor, my response to that is that that was a response to the outburst by the witness on the stand, which was non-responsive to the question . . . and I think it is impeachment as to her whether or not she has lied concerning the use of sex for the purposes of obtaining money. And that fits within the impeachment theory of this case . . . this is not a rape shield question. This is a straight impeachment of veracity question: Have you lied concerning a material substantive issue. . . .

(Id. at 3-4.)

The State did not seek a ruling on its objection to the question posed by defendant's counsel, but instead argued in favor of its Motion for Mistrial. (Id. at 7.)

Defendant's counsel argued the admissibility of the question. (Id. at 4-6.) The Court did not rule on the admissibility of the question, but instead granted the Mistrial. (Id. at 7.) The defendant excepted to the ruling. (Id.) Thereafter the Court stated that it had considered whether the Court could cure the situation "by an instruction to the jury. I came to the conclusion that I couldn't, and therefore, I've decided on the mistrial." (Id. at 8-9.) The Court called for the parties to resume on the following morning, at which time a new jury was to be picked. (Id. at 8.) Reproduced in the appendix is the argument and ruling on the State's motion for mistrial.

On September 10, 1986, as the Court resumed, the defendant filed a Motion to Dismiss the information based on the Court's failure to rule on the admissibility of the question posed, and on the Court's failure to consider alternative methods of resolving whatever difficulties there were with the question posed, and because of the failure to show a manifest necessity for the mistrial. (Motion to Dismiss, Sept. 10, 1986.) The State sought and was granted an opportunity to prepare a response to the Motion; (State's Brief in Opposition to Defendant's Motion to Dismiss, Sept. 15, 1986); and argument was set for September 17, 1986; (T., 9/10/86, at 5-6); at which time the Motion was denied. (T., 9/17/86, at 21.) The defendant duly

excepted to the ruling, and stated his intention to appeal the decision of the court. (Id.)

DECISION OF THE CONNECTICUT SUPREME COURT

The Connecticut Supreme Court, in affirming the denial of the motion to dismiss, held that the trial court did not abuse its discretion in declaring the mistrial after it concluded that the question posed to the alleged victim caused irreparable damage. State v. Autorino, 207 Conn. 403 (1988). The opinion of the Connecticut Supreme Court is reproduced in the appendix. In its opinion, the Court acknowledged that the trial court never ruled upon the admissibility of the question that triggered the mistrial, nor did the Connecticut Supreme Court express an

opinion on the question of admissibility despite the fact that both parties briefed the issue.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE CONNECTICUT SUPREME COURT MISAPPLIED THE TEST ANNOUNCED IN ARIZONA V. WASHINGTON, 434 U.S. 497, 54 L.Ed.2d 717, 98 Sup. Ct. 824 (1978) FOR THE DECLARATION OF A MISTRIAL BASED UPON MANIFEST NECESSITY.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION FOR A MISTRIAL IN THAT: (1) IT ACTED PRECIPITATELY, (2) NEVER CONSIDERED DEFENDANT'S RIGHT TO HAVE HIS CASE RESOLVED BY THE JURY SELECTED, (3) FAILED TO CONSIDER ALTERNATIVES TO A MISTRIAL, AND (4) NEVER RULED ON THE ADMISSIBILITY OF THE QUESTION THAT TRIGGERED THE MISTRIAL.

In Arizona v. Washington, supra the Court held that a trial court's decision to declare a mistrial because of improper defense conduct will not be disturbed if the trial court exercised "sound discretion." The Court will look at the complete

record to determine whether the trial court gave due consideration to the defendant's right to have his case concluded before the jury selected. The Court will examine the record to determine whether the trial judge acted precipitately in response to the prosecutor's request for a mistrial or gave careful consideration to the serious double jeopardy implications of the request. The record in the instant case will reflect that the trial judge acted precipitately, gave no serious considerations to possible alternatives and never reflected on the double jeopardy implications of his actions, nor ruled on the admissibility of the question that triggered the mistrial.

THE TRIAL JUDGE ACTED PRECIPITATELY

The decision of the trial judge to declare a mistrial is reprinted in our appendix (App. at 12A). After defense counsel asked, "Did you ever tell Steven Gorman that you were pregnant and needed an abortion and needed money from him?" the prosecutor objected, the jury was excused and the prosecutor moved for a mistrial. This occurred at page 3 of the trial transcript. The court entertained limited argument and in a manner of a few minutes declared a mistrial at page 7 of the transcript. (App. at 21A.) What occurred in the intervening five pages is not the type of reflection, consideration and balancing of interests that reflects the exercise of "sound discretion." In Arizona v. Washington, supra, the trial judge initially denied the

prosecutor's request for a mistrial. On the next day, however, he heard further argument from both sides and expressed his concern about the possibility that an erroneous mistrial ruling would preclude another trial. Based on the foregoing, the Court concluded that the trial judge ". . . acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding . . . ." Arizona v. Washington, supra at 98 S.Ct. 835.

The trial judge in the instant case acted in a totally contrary manner. Firstly, he granted the mistrial within minutes of the prosecutor's motion. Secondly, he gave no consideration whatsoever to the defendant's right to have his

case concluded by the jury selected or the double jeopardy implications of his actions. Thirdly, he never ruled on the propriety of the question or considered holding a hearing out of the presence of the jury to determine whether the question was admissible. The trial judge failed to do so despite the fact that defense counsel had filed a memorandum in support of his motion in limine arguing for admissibility.

Only after he had declared a mistrial and excused counsel did the trial judge call the prosecutor back into the courtroom (defense counsel never left) and stated that he had considered whether a curative instruction would cure the problem but decided it would not and therefore decided to declare a mistrial.

What appears to have impacted on the trial judge's decision to declare a mistrial was the fact that defense counsel had indicated prior to the commencement of evidence that he would not put the question to the witness but did so anyway. Five pages of transcript discourse, reflecting irritation at the tactics of defense counsel, is not the type of calm and deliberate consideration consonant with the exercise of sound discretion.

In its opinion affirming the denial of the motion to dismiss, the Connecticut Supreme Court held that the "failure to rule on the admissibility of the question in this instance did not constitute error." The Court went on to state that it expressed no opinion as to the admissiblity of the question

propounded to the complaining witness by defense counsel. State v. Autorino, supra at page 411, footnote 7.

The Connecticut Supreme Court erred in reaching the foregoing conclusion. If the question were admissibile, what basis would exist for the trial court's conclusion that the question caused irreparable damage? At a minimum, this Court should remand the issue of the admissibility of the question to the Connecticut Supreme Court with directions to decide the issue or to remand it to the trial court for a resolution of the issue. The trial court may wish to hold an evidentiary hearing on the admissibility of the question. The record would then be complete for a double jeopardy challenge. In the briefs to the

Connecticut Supreme Court, both sides briefed the issue of the admissibility of the question, but as we noted the Court declined to reach the issue.

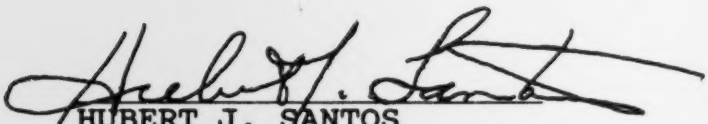
CONCLUSION

The trial judge acted precipitately in declaring a mistrial and never expressed any concern for defendant's right to have his case concluded by the jury selected. The trial judge failed to give any consideration to alternatives to a mistrial and only after the mistrial was declared considered but rejected as inadequate a curative instruction. Neither the trial court nor the Connecticut Supreme Court passed upon the admissibility of the question asked of the alleged victim. If the question were admissible, no basis existed for a mistrial. With this

record, the trial judge should have granted defendant's motion to dismiss on double jeopardy grounds. For these reasons, Petitioner respectfully requests that the writ of certiorari be granted.

Respectfuly Submitted,

THE PETITIONER
MARK AUTORINO



HUBERT J. SANTOS
A member of the Bar of the Supreme Court of the United States

No. _____

In The
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OCTOBER TERM, 1988

MARK AUTORINO
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APPENDIX

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TO APPENDIX

NO. 13079

STATE OF CONNECTICUT: SUPREME COURT

v. : STATE OF CONNECTICUT

MARK AUTORINO : MAY 10, 1988

DECISION AND JUDGMENT OF
CONNECTICUT SUPREME COURT
RENDERED ON MAY 10, 1988

STATE OF CONNECTICUT *v.* MARK AUTORINO
(13079)

HEALEY, CALLAHAN, GLASS, COVELLO and SANTANIELLO, Js.

Where, as here, a criminal defendant objects to the declaration of a mistrial, and the mistrial is declared for reasons amounting to "manifest necessity," his right to have his trial completed by his chosen tribunal is no longer protected and the double jeopardy clause does not bar a second trial. Here, the trial court did not abuse its discretion when it declared a mistrial during the defendant's trial for the crime of sexual assault in the third degree after it concluded that the substance of a question posed to the victim by defense counsel, without notice to the court or the prosecution in breach of an earlier express agreement between counsel, caused irreparable damage.

Argued November 5, 1987—decision released May 10, 1988

Information charging the defendant with the crime of sexual assault in the third degree, brought to the Superior Court in the judicial district of Hartford-New Britain, geographical area number twelve, where the court, *Hale, J.*, on a trial to a jury, granted the state's motion for mistrial; thereafter, the court denied the defendant's motion to dismiss the information, and the defendant appealed. *No error.*

Barbara B. Sacks, for the appellant (defendant).

Judith Rossi, deputy assistant state's attorney, with whom, on the brief, were *James G. Clark,* assistant state's attorney, and *Theodore R. Paulding,* deputy assistant state's attorney, for the appellee (state).

SANTANIELLO, J. This appeal is from a decision of the trial court denying the defendant's motion to dismiss the information in a criminal prosecution based

upon the guarantee against double jeopardy as provided by the fifth amendment to the constitution to the United States.

The defendant was arrested and charged with one count of sexual assault in the third degree, in violation of General Statutes § 53a-72a. The charge arose from a complaint made by an eighteen year old woman who alleged that on July 4, 1985, she went to the defendant's home, at his invitation, to discuss arrangements for babysitting. While at his house, the complainant alleged that the defendant offered her money and forced her to submit to sexual contact over a thirty to forty minute period.

On September 3, 1986, just prior to the commencement of trial, the defendant filed a motion in limine[1]

[1] "Motion in Limine

"The defendant respectfully prays the Court to permit the entry of the evidence cited in the attached memorandum of law. The defendant prays the Court to:

"(1) Admit all these choices of evidence cited in the attached memorandum; or in the alternative;

"(2) hold a pre-trial hearing pursuant to Connecticut General Statutes Section 54-86f concerning the admissibility of the evidence."

"Memorandum in Support of Defendant's Motion in Limine

"FACTS

"The defendant in the above entitled matter stands charged with the offense of sexual assault in the third degree in violation of [General Statutes §] 53a-72a. The defendant files the instant motion in order to seek the Court's ruling concerning the admissibility of certain evidence. The defendant represents and hereby formally makes an offer of proof to introduce evidence concerning the following:

"(1) That the alleged victim of the offense has previously extorted money from individuals by claiming to be pregnant with their children and in need of an abortion. In fact, she was not pregnant with their children and utilized the money in another manner. This has occurred on more than one occasion and witnesses to this effect are under subpoena.

"(2) Witnesses will be produced who will testify that the alleged victim of this offense has utilized cocaine and marijuana in the past and has sought sources of them.

"(3) A witness will be produced who will state that the alleged victim of this offense has made statements indicative of having brought these charges in order to obtain money from the defendant."

seeking a pretrial ruling on the admissibility of certain evidence. The court heard brief argument on the motion at which time defense counsel informed the court that he was not seeking an immediate ruling. It was then agreed by the court and both counsel that further argument on the motion in limine was not appropriate until after the direct examination of the victim had taken place, and that a hearing and ruling on the motion would be postponed until that time.

The trial commenced immediately thereafter and the state's first witness was the victim. She testified as to the particulars of the incident. Upon completion of direct examination defense counsel commenced cross-examination, at which time he inquired if the witness had previously sought to obtain money from another male acquaintance by informing him that she was pregnant and needed an abortion. The state immediately objected and, outside the presence of the jury, moved for a mistrial. The defense counsel sought a ruling on the question propounded. The court did not rule on the admissibility of the question but instead granted the motion for mistrial. A new trial was scheduled for the next morning at which time the defendant filed a motion to dismiss the information and bar prosecution based upon the guarantee of the double jeopardy clause of the United States constitution. The court denied the defendant's motion which resulted in this appeal.

The sole issue raised by the defendant[2] is whether the trial court erred in failing to grant the defendant's motion to dismiss on the ground of double jeopardy as guaranteed by the fifth amendment to the United States constitution. We find no error.

[2] The defendant originally raised a second issue alleging that the court erred in failing to grant his motion to compel discovery. This issue was dismissed by order of this court on March 25, 1987.

"The fifth amendment to the United States constitution provides, in relevant part, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' 'This clause, which is applicable to the states through the fourteenth amendment; *Benton* v. *Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); establishes the constitutional standards concerning the guarantee against double jeopardy. *Crist* v. *Bretz*, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978); *Benton* v. *Maryland*, supra, 795.' *State* v. *Roy*, 182 Conn. 382, 385, 438 A.2d 128 (1980); see *Arizona* v. *Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). Inasmuch as the jury had been selected and sworn . . . jeopardy had attached. *Crist* v. *Bretz*, supra; *United States* v. *Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); *State* v. *Roy*, supra. The fact that jeopardy has attached does not, however, mean that a later termination of the trial mandates a dismissal of the charge based on the double jeopardy clause. *United States* v. *Jorn*, supra, 483–84; *State* v. *Roy*, supra; *State* v. *Aillon*, 182 Conn. 124, 128, 438 A.2d 30 (1980), cert. denied, 449 U.S. 1090, 101 S. Ct. 883, 66 L. Ed. 2d 817 (1981); see generally Schulhofer, 'Jeopardy and Mistrials,' 125 U. Pa. L. Rev. 449 (1977). This is so even though this 'constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." ' *Arizona* v. *Washington*, supra." *State* v. *Van Sant*, 198 Conn. 369, 376, 503 A.2d 557 (1986). "When a criminal defendant objects to the declaration of a mistrial . . . and the mistrial is declared for reasons amounting to 'manifest necessity,' his right to have his trial completed by his chosen tribunal is no longer protected and the double jeopardy clause does not bar a second trial. *Illinois* v. *Somerville*, 410 U.S. 458, 462, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); *Gori* v. *United States*, 367 U.S. 364, 368, 81 S. Ct. 1523, 6 L. Ed. 2d 901

(1961); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824); *State* v. *Roy*, supra, 386; *Matter of Plummer* v. *Rothwax*, 63 N.Y.2d 243, 471 N.E.2d 429, 481 N.Y.S.2d 657 (1984)." *State* v. *Van Sant*, supra, 377.

Even though the court does not make an express finding of "manifest necessity," " 'a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.' See generally Holleman, 'Mistrials and the Double Jeopardy Clause,' 14 Ga. L. Rev. 45, 57 (1979)." *State* v. *Van Sant*, supra.

"Justice Story, writing for the United States Supreme Court in *Perez*, set forth standards for determining when to order a retrial after the declaration of a mistrial over the defendant's objection. He said: 'We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . .' *United States* v. *Perez*, supra, 580." *State* v. *Van Sant*, supra, 378.

In criminal cases, the defendant's constitutional right not to be twice tried for the same offense places the burden on the state to establish the necessity for a mistrial. Mistrials should be granted only where there is substantial and irreparable prejudice to the defendant or to the state, or where the jury is unable to reach

a verdict. Practice Book §§ 887 through 889.[3] Circumstances may arise which may cause the court to grant a mistrial in order to avoid an unjust decision to either party. There is no mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. *Illinois* v. *Somerville,* supra, 462. Each case must be assessed on the basis of the particular circumstances before the presiding judge.

" 'A reviewing court looks for a manifest necessity by examining the entire record in the case without limiting itself to the actual findings of the trial court. . . .' It is the examination of the propriety of the trial court's action against the backdrop of the record that leads to the determination whether, in the context of a particular case, the mistrial declaration was proper. Given the constitutionally protected interest involved, reviewing courts must be satisfied . . . that the trial judge exercised 'sound discretion' in declaring a mistrial." (Citations omitted.) *State* v. *Van Sant,* supra, 379.

[3] "[Practice Book] Sec. 887. — —FOR PREJUDICE TO DEFENDANT

"Upon motion of a defendant, the judicial authority may declare a mistrial at any time during the trial if there occurs during the trial an error or legal defect in the proceedings, or any conduct inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial shall not be declared as to a defendant who does not make or join in the motion."

"[Practice Book] Sec. 888. — —FOR PREJUDICE TO STATE

"Upon motion of the prosecuting authority, the judicial authority may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the defendant, his counsel, or someone acting at the request of the defendant or his counsel, which results in substantial and irreparable prejudice to the prosecuting authority's case. If there are two or more defendants, the mistrial shall not be declared as to a defendant if neither he, nor his counsel, nor a person acting at his or his counsel's request participated in the misconduct, or if the prosecuting authority's case is not substantially and irreparably prejudiced as to him."

"[Practice Book] Sec. 889. — —JURY'S INABILITY TO REACH VERDICT

"The judicial authority shall declare a mistrial in any case in which the jury are unable to reach a verdict."

In the instant case, the defendant sought a ruling on his motion concerning the victim's alleged practice of extorting money from men by falsely claiming to be pregnant with their children. After discussion between counsel and the court, defense counsel informed the court that he was "not necessarily pressing for a ruling right now," but that he would begin cross-examination and "alert the court [when he was] approaching an area that's contained in [the] motion in limine, so the court can then decide how the court wants to handle that, either by excusing the witness or the [jury], however we want to do that."[4] The court thus deferred ruling, stating that, "[w]e're all in agreement then that the motion in limine should stand in abeyance at this time."

Despite this agreement defense counsel without alerting the court, proceeded to inquire whether the victim had sought money from a male acquaintance claiming that she needed an abortion.[5] The state immediately objected and asked that the jury be excused. In the absence of the jury, the state moved for a mistrial claiming that the agreement with the court had been violated and that the question was "unbelievably damaging" and was "so prejudicial that [it would]

[4] Defense counsel had informed the court that the purpose of the motion in limine was "to alert the court [to] those evidentiary situations that trial counsel can see arise . . . so that the court is not blindsided by the events . . . and that the court can have a chance to anticipate that."

[5] During cross-examination of the victim the following discourse took place:

"Q. No, but I didn't ask you that. Do you lie?

"A. Have I ever lied?

"Q. Yeah.

"A. In my whole life?

"Q. Yeah.

"A. Yes.

"Q. All right. Do you know Steven Gorman?

"A. Yes.

"Q. Did you ever tell Steven Gorman that you were pregnant and needed an abortion and needed money from him?"

totally taint the perspective of the jury." Defense counsel conceded that "maybe I got caught up in the heat of the moment"[6] and sought a ruling on the admissibility of the question.[7] The court, upon reflection, stated, "I don't believe the court has any choice but to declare a mistrial at this time, and the court will declare a mistrial." After informing counsel that the case would commence once again on the following morning, before discharging the jury, the court stated on the record, "I just want to make one more brief statement for the record . . . . As I sat there listening to argument [on the state's motion for a mistrial,] I debated with myself whether or not this is something that I could cure by an instruction to the jury. I came to the conclusion that I couldn't, and therefore, I've decided on the mistrial."

[6] "Mr. Clifford: Yes, the question I had asked was: Did she ever approach this young man for the purposes of obtaining money for an abortion.

"Mr. Paulding: I think the word pregnancy was used.

"Mr. Clifford: Pregnancy I think is the word I used.

"The Court: And you did on the record indicate you would not mention that without first making the court aware of it . . . .

"Mr. Clifford: Well—

"The Court: . . . for purposes of giving counsel an opportunity to argue it, is that correct?

"Mr. Clifford: I'm concerned about that, because I think that maybe I got caught up in the heat of the moment, Your Honor, and I must admit that that's probably—I made a decision and I've alerted everybody to this matter; didn't have to file the motion in limine, didn't have to do anything. He would have to deal with that just as it's been risen in this context. And I tried not to do that. I've been trying to do this since June 14th. That's the date of my motion in limine. I have not been able to get it off the ground. I haven't had anybody been able to sit down and say, all right, let's put out the parameters of this case and see where this case is going. And what happens is—

"The Court: Now, please, just a minute, Mr. Clifford.

"Mr. Clifford: Yeah.

"The Court: It's just at the opening of this trial every opportunity was given to you and you were in perfect agreement that we not take up the motion in limine. At least you surprised me with this argument."

[7] The record reflects that the court considered the substance of the question, which was put forth by defense counsel, without notice to the court

The record reflects that the trial court considered the agreement, the violation of the agreement by defense counsel, the prejudicial impact on the jury, and the possibility of curative instructions. The court was in the best position to evaluate the circumstances and the effect of the question on the right to a fair and just trial.

The court concluded the question was so damaging that it would prevent both the state and the defendant from receiving a fair trial before the jury. By scheduling the trial on the following day before a new jury, there was neither delay nor damage to the defendant's ability to conduct his defense before an impartial jury. The potential for a tainted jury verdict was eliminated and the opportunity for the jury trial to proceed without the potentially damaging statements made in the presence of the jury was assured.

The decision to declare a mistrial rests in the sound discretion of the trial judge who is best situated to take all the circumstances into account and to decide whether a mistrial is in fact required in a given case. *State* v. *Van Sant*, supra, 384.

The trial court is in the best position to assess all the factors that must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict. The difficulty that led to the mistrial in this case also falls in an area where the trial judge's determination is entitled to special

or the state in breach of an express agreement between the parties, and concluded it caused irreparable damage. After dismissing the jury, the court heard argument by the state regarding the grounds for a mistrial, and argument by defense counsel claiming that the question was raised for impeachment purposes, directed at the veracity of the victim, and did not involve the rape shield statute. The court concluded that mistrial was the appropriate remedy under the existing circumstances. The failure to rule on the admissibility of the question in this instance did not constitute error. Nor, under the circumstances do we express an opinion as to the admissibility of the question propounded to the complaining witness by defense counsel.

respect. There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. The judges have seen and heard the jurors during their voir dire examination. They are the judges most familiar with the evidence and the background of the trial. They have listened to the tone of the question propounded, observed the apparent emotionalism of defense counsel who got "caught up in the heat of the moment" and any reaction the jurors may have had to the situation at hand. In short, they are far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. See *Wade* v. *Hunter*, 336 U.S. 684, 687, 69 S. Ct. 834, 93 L. Ed. 974, reh. denied, 337 U.S. 921, 69 S. Ct. 1152, 93 L. Ed. 1730 (1949). We find no error.

In this opinion the other justices concurred.

NO. 13079

STATE OF CONNECTICUT: SUPREME COURT

v. : STATE OF CONNECTICUT

MARK AUTORINO : JUNE 3, 1988

ORDER OF CONNECTICUT SUPREME COURT
DENYING MOTION TO REARGUE
RENDERED ON JUNE 3, 1988

STATE OF CONNECTICUT
SUPREME COURT

NO. 13079

STATE OF CONNECTICUT

v. JUNE 3, 1988

MARK AUTORINO

O R D E R

THE MOTION OF THE DEFENDANT FILED MAY 20, 1988, TO REARGUE OR FOR RECONSIDERATION,

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.

BY THE COURT,

/s/ CAROLYN CUNHA ZIOGAS
ASSISTANT CLERK-APPELLATE

NOTICE SENT: 6/3/88

SKELLEY, CLIFFORD, VINKELS, WILLIAMS & ROTTNER
T. R. PAULDING, A.S.A.
JAMES G. CLARK, A.S.A.
JUDITH ROSSI, D.A.S.A.
HTFD. AT GA13, (CR13-60443)
HON. ROBERT J. HALE
REPORTER OF JUDICIAL DECISIONS

NO. CR13-850060443 : SUPERIOR COURT

STATE OF CONNECTICUT : G.A. 13

v. : AT ENFIELD

MARK AUTORINO :

ARGUMENT AND THE TRIAL COURT'S
RULING ON STATE'S MOTION FOR MISTRIAL
RENDERED ON SEPTEMBER 9, 1986

Q Yeah

A In my whole life?

Q Yeah.

A Yes.

Q All right. Do you know Steven Gorman?

A Yes.

Q Did you ever tell Steven Gorman that you were pregnant and needed an abortion and needed money from him?

MR. PAULDING: Objection, your Honor.

MR. CLIFFORD: I claim it.

MR. PAULDING: I'd ask the jury to be excused.

MR. CLIFFORD: I claim it, your Honor.

THE COURT: The jury may be excused.

(The jury leaves the courtroom.)

MR. PAULDING: At this time, the state moves for a mistrial on the basis that the state was previously informed that we were going to have some advanced notice of this prior to the question being posed, that we were going to discuss this and talk about it with your Honor and make our legal arguments.

I believe there are certainly several arguments I was going to be making reference to that type of question, and I think it's clear from the question itself whether or not your Honor permits an answer, that the question is unbelievably damaging, and the state moves for a mistrial at this time.

MR. CLIFFORD: Your Honor, my response to that is that that was a response to the outburst by the

witness on the stand, which was nonresponsive to the question. And secondly, has accused people of lying, and I think it is impeachment as to her whether or not she has lied concerning the use of sex for the purposes of obtaining money. And that fits within the impeachment theory of this case and the theory of this case. It has nothing to do by the way -- this is not a rape shield question. This is a straight impeachment of veracity question: Have you lied concerning a material substantive issue. And I think that....

MR. PAULDING: We were well aware of this argument. We were well aware that this was going to take place. And all I am saying at this point, is that if counsel had

stuck to his original thing that he told the court that we were going to be notified before it, we could have had the argument. My point is not that, we'll be happy to get into the argument. My point is that the question was asked. And the question is so prejudicial that it's going to totally taint the perspective of the jury.

MR. CLIFFORD: Your Honor, it is not a prejudicial question. One, if the facts are that there has been a false claim of pregnancy for the purposes of obtaining money, then that is a subject matter that goes to the veracity of the complaining witness concerning this....

MISS CHARBONNEAU: Why would I lie about something....

THE COURT: Michelle, just a moment, please, now.

MR. CLIFFORD: By the way, there's lots of people in this audience talking by the way, your Honor. I believe her parents are here, and they're talking to me over my shoulder. I don't really mind that except that it does sort of disturb the flow of the business. I think Mrs. Charbonneau is particularly at fault, and I'm, not really anxious to engage in that kind of a conversation. That's not what my business --

THE COURT: Well, I think right now, Mr. Clifford, let's stick to the point that's been raised.

MR. CLIFFORD: I think -- I think I've said it, your Honor.

THE COURT: Well, you filed a motion in limine and in that motion you clearly indicated that you were going to bring up this matter.

MR. CLIFFORD: Yes. The question I had asked was: Did she ever approach this young man for the purposes of obtaining money for an abortion.

MR. PAULDING: I think the word pregnancy was used.

MR. CLIFFORD: Pregnancy I think is the word I used.

THE COURT: And you did on the record indicate you would not mention that without first making the court aware of it....

MR. CLIFFORD: Well --

THE COURT: ...for purposes of giving counsel an opportunity to argue it, is that correct?

MR. CLIFFORD: I'm concerned about that, because I think that maybe I got caught up in the heat of the moment, your Honor, and I must admit that that's probably -- I made a decision and I've alerted everybody to this matter; didn't have to file the motion in limine, didn't have to do anything. He would have to deal with that just as it's been risen in this context. And I tried not to do that. I've ben trying to do this since June 14th. That's the date of my motion in limine. I have not been able to get it off the ground. I haven't had anybody been able to sit down and say, all right, let's put out the parameters of this case and see where this case is going. And what happens is --

THE COURT: Now, please, just a minute, Mr. Clifford.

MR. CLIFFORD: Yeah.

THE COURT: It's just at the opening of this trial every opportunity was given to you and you were in perfect agreement that we not take up the motion in limine. At least you surprised me with this argument.

MR. CLIFFORD: Well --

MR. PAULDING: (a), your Honor, I would have thought that counsel would have had notified the court of such a question with or without a motion in limine knowing full well the damaging effect of the question itself and then letting us argue it; and (b), there was a motion in limine, and it was my understanding after putting our feel-

ings on the record, that after the direct examination, by me, that Mr. Clifford would engage in cross-examination and would notify the court, as he said earlier today, of when he intended to deal with the subject. And I think then is the time to discuss whether or not inquiries, not answers, but inquiries regarding this subject matter might be proper. This rape shield law is extremely powerful, and I think it deals not only with the answers but the inquiries, and Mr. Clifford well knows that. Knowing that, he should have notified the court before asking the question; heat of battle or no heat of battle.

THE COURT: I don't believe the court has any choice but to declare a mistrial at this time, and the court will declare a mistrial.

MR. PAULDING: Thank you, your Honor.

THE COURT: We'll proceed to pick another jury as soon as we're able to do so.

MR. CLIFFORD: May I have an exception to that ruling, your Honor.

THE COURT: Exception is noted, yes.

We'll begin tomorrow morning promptly. We'll dispose of business shortly and then we'll begin immediately thereafter to choose another jury in this case.

I believe irreparable damage has been done. I think that counsel for the state has been taken by surprise and the court was taken by surprise when the court was lead to believe that there would be some opportunity to discuss this.

Please step down, Miss. We'll resume again tomorrow morning. I'll ask you to clear the courtroom. I wish to speak to the jury very briefly.

MR. CLIFFORD: Okay.

MR. SHERIFF: Please clear the courtroom.

MR. CLIFFORD: Your Honor, I will be having motions addressed to the court tomorrow before the jury selection starts.

THE COURT: Okay. I'm going to ask you, gentlemen, to leave too. This is nothing that you're concerned with. I'm just going to thank the jury.

Before you leave I'll make one more -- ask Mr. Paulding to come back.

I just want to make one more brief statement for the record, I wanted you to hear it.

As I sat there listening to argument I debated with myself whether or not this is something that I could cure by an instruction to the jury. I came to the conclusion that I couldn't, and therefore, I've decided on a mistrial.

MR. PAULDING: Thank you, your Honor.

MR. CLIFFORD: Thank you, your Honor.

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NO. CR13-850060443 : SUPERIOR COURT

STATE OF CONNECTICUT : G.A. 13

v. : AT ENFIELD

MARK AUTORINO :

ARGUMENT AND THE TRIAL COURT'S RULING ON DEFENDANT'S MOTION TO DISMISS DATED SEPTEMBER 17, 1986

THE COURT: Are you ready to argue the motions on Autorino before we --

MR. CLIFFORD: Ready for the defendant, your Honor.

MR. PAULDING: Ready.

THE COURT: All right. Mr. Clifford.

MR. CLIFFORD: Good morning, your Honor, and may it please the court, the defendant has filed a Motion to Dismiss on the grounds of the protection of the Double Jeopardy Clause of the United States Constitution.

For the purposes of my argument this morning, your Honor, I'll accept those portions of the transcript that appeared in Mr. Paulding's brief of September 15, 1986.

Prior to the taking of the direct testimony of the complaining witness in this case, the transcript will indicate that I did, in fact, make certain repre-

sentation to the Court. It should be noted, your Honor, that I indicated that I can tell the Court that I have my subject matter broken down into area. And that while I can't say what the answers are going to be, I think I can have some guiding light as to where I'm going, and I'll alert the Court when I'm approaching those areas.

That remark was made in connection with the Motion in Limine previously filed with this court and filed with the State's Attorney.

The purpose of the Motion in Limine was to alert the Court to what I conceived to be evidentiary problems coming down the line in the course of the trial.

The Motion in Limine says: One, those evidentiary problems are clearly, in our opinion, not within the Rape Shield law. They were broken down into three categories.

1. Previous extortion by the complaining witness to receive money.

2. The use of drugs by the complaining witness and;

3. The claim of extortion as to this defendant based upon the actions of the complaining witness.

We did indicate that if the Court was concerned about those questions, that if any claim was made under the Rape Shield law, a hearing could be had on that particular issue. We did take the position that none of those questions, on none of those areas, involved the Rape Shield law. I'll go back and I'll direct my attention to the specific question at point.

If you read the Motion in Limine, the real concern that we had is not were those questions within the rape Shield law, but whether or not we were going to be allowed to impeach with collateral evidence the testimony of the complaining witness. And that's in line with Martyn v. Dolin. Martyn v. Donlin is the case that stands for the proposition which Horn Book Law in the State of Connecticut, that the veracity of the witness is always at issue. Therefore, the witness can always be asked a subject matter on his or her truthfulness, and you can do it by specific misconduct. The real question, and the one that we pose to the Court, is clearly outlined in our Motion in Limine, is not, one, can we ask that question. The real question is whether or not the subject matter of the question is substantial and material enough to the elements in this

case, so that we would be allowed to bring in extraneous testimony and witnesses to impeach the veracity of the witness.

In the Martyn v. Donlin case, that involved an officer who was charged in a civil case with negligently shooting a youngster at the scene of a crime. And the question posed to the officer was, had you not previously filed, under oath, a false claim before -- I think it was the Workmen's Compensation Board. He answered yes, I think is what he said. And then the defendant offered the very records of the false application of the Workmen's Compensation Board. The trial court allowed it in and on appeal the Supreme Court said;

1. The question as to the veracity of the witness is allowed.

2. The records concerning the false oath before the Workmen's COmpensation Board was so remote from the incident of the negligent shooting of a youngster, that that, in fact, should not have been allowed.

Do in our case, your Honor, the question that was directed to the witness was based on the theme and the theory, all laid out in our Motion in Limine. There was no hidden ball tricks as to where the subject matter was going to be, was that on a previous occasion, on two occasions, she had told young men that she was pregnant when, in fact, she was not, got money from them, and gave that money to a third party. To corroborate that I had two witnesses, the two young men, under subpoena, who paid the young lady, and a third wit-

ness who had a conversation with the complaining witness whereby she admitted that that's what she did.

Now, under no stretch of the imagination can that be a Rape Shield subject. There is no accusation of the witness of prior sexual misconduct. The fact that she used sex as a vehicle to extort money from somebody else has nothing to do with the Rape Shield law. The Rape Shield law is an effort to produce prior sexual misconduct in order to show that she's a bad person. That's not what we were doing. We had evidence as a matter of fact, that there were abortions. She had them on previous occasions. That was not a subject matter we were going to get into. The question was, the real question is, did you ever lie to somebody to obtain money claiming a situation which was not true.

Now the real problem I have from an evidentiary point of view, there's no question I could ask that question, the problem I had is was I going to be able to impeach whatever answer. The risk I was running was that she give me a no answer, and the trial court could find that that subject matter was so irrelevant to the material issues at hand, that I would not be able to bring the other witnesses on. And if you read my Motion in Limine, that's the real problem of where I was going on the evidentiary question.

So that the claim, your Honor, is whatever I said prior to that in advance does not solve the problem of the admissibility of that question. That question is not a Rape Shield law question. And our Motion in Limine makes that absolutely clear that's our opinion, and we've checked that with a number of people, and we

all come up with the same answer. That's a veracity question; veracity of the witness is always at issue, and that question was admissiblity.

And secondly, your Honor, the other thing, and I guess I can't really -- I've got to indicate, I can't claim it as a waiver, but the statute clearly provides, 54-84e, clearly provides that tne name and the address of the complaining witness in this kind of a case, shall not be revealed to the public. And we start the cross-examination as what is your name and where do you live. And I've got to tell you I'm sitting at this table, and I can't believe what I'm hearing.

Now I don't know, I think the State insofar as it can waived the protection of the Rape Shield law by posing those questions. I think really the Rape Shield law protection is for the benefit of the wit-

ness, not for the State. So I guess I can't -- I have an intellectual approach if that's a waiver. I think it probably is really not a waiver.

But the second thing that happened, and it became very clear, is that this witness was never instructed to stay on the facts of the case. Let me give you an exam -- if anybody had grounds for a mistrial, I did. And I didn't raise it because I picked that jury, I wanted that jury, and that testimony from my perception was going to the benefit of my client. She volunteered, that she made this complaint, so that my client couldn't touch his children again. Now what kind of a testimonyt is that. Who told her to do that, who prompted her to do that, or who instructed her not to do that. And she volunteered. She looked right over at my client and said, he's lying, he's lying

now. He's never testified, he's never made a statement, and he's lying to her now.

THE COURT: I think you're getting a little bit off the track now. Let's get back to the issue....

MR. CLIFFORD: Well, the issue at hand, judge, is that the witness is the one, and I told you I couldn't foresee the answers to questions. The witness is the one in unresponsive question that introduced the subject of lying. And that's all that that question I posed to her was. It is not a sexual misconduct question, it's a question did you ever lie to somebody to claim to get money.

The grounds of the mistrial as I recall, and I don't have a transcript so I'm at somewhat of a disadvanatage, the grounds of the mistrial is that this was a highly prejudicial and irreparable harm

question. Judge, the trial cases is full of prejudicial and highly irreparable harm damage question. I have a lot of them directed to me all the time, and to my clients all the time. That question was it prejudicial to her, if you allowed it in and she had to answer and I was allowed to impeach it, certainly it's prejudicial to her. And that testimony, would that be irreparable damage to her, it could well be, it could well be. But she's a witness to the State and her veracity is an issue.

What I'm saying, judge, is the ground rules change. The ground rules changed in the course of that testimony, and she was never instructed, and she raised the issue of lying and that question on cross-examination is a cross-examination as to veracity. So that the real question, your Honor, on the mistrial is, the Court did not rule on the admissibility of that

question. If that question is admissible, and I claim it is, then there can't be a mistrial. To claim it because it is irreparable harm, or highly damaging to the witness, that's not the grounds for a mistrial. It can't be a grounds for a mistrial. All questions are like that.

And so that I would respectfully suggest that the question, what should have been happen -- he certainly had a right to object and to excuse the jurors. We now had the jurors excluded. Interestingly what portion of the transcript I have, I argued the admissibility of that question. That's the real question. He did not argue the admissibility. He had an opportunity with the jury out to argue the Rape Shield protection as to this witness. And it always amazed me, that for the defense lawyer the jurors can be instructed, disregard that answer. But for the prosecu-

tion that's not good enough. It happens everyday in the course of trial. Jurors are instruced that we -- may be it's a myth and may be they can't but it's the myth we live with that they're told to forget that question, to forget that answer. That was certainly a solution in this case. But the first question to be asked I think is was the question admissible. Was that a proper question for the cross-examination of this witness. Be it highly prejudicial, be it damaging, be whatever. Did it go to her veracity. And the second question which really was the purpose of the Motion in Limine was regardless of the answer was I going to be able to impeach her with outside extraneous testimony.

And so therefore, your Honor, I think that given that situation without a prior determination on the admissibility of that

question, there is no manifest necessity whether you cite it or not. And I agree with Arizona v. Washington. This court doesn't have to say I find a manifest necessity. But the real question is, was that question admissible. And that was never ruled upon by the Court prior to a mistrial.

Your Honor, if the question is admissible, then I think the trial should have continued. And my client should have been allowed to have that jury that he picked. And by the way, your Honor, I don't know how many other defense lawyers lay out their case like I do in a Motion in Limine. There was absolutely no hidden ball tricks anywhere in this case. This case has probably been laid out for the prosecutor better than I've ever done it in any criminal trial that I've ever had. He knew the witnesses; he knew the testimony;

he knew the trust of the testimony; he knew where it was going, and it became obvious that that witness was not instructed. And by the way, may be I should have asked was that done, and I didn't. It's fairly usual in sexual assault cases to make sure that the witness has been told not to volunteer information and not to deviate from the pad.

Many other instances, your Honor, on where that witness volunteered, and frankly, I didn't object, and the record should indicate, because I had my own purposes where I was going with all that, but she was the one who was creating the very dangerous atmosphere in this courtroom. It was clear she was shouting he's lying, and that he's lying to her, his wife. That's a lying question to which a proper cross-examination was to her veracity. And I would argue, your Honor, that the

mistrial was improvidently granted, that there wasn't a sufficient basis in determination as to the admissibility of the question, because if the question is admissible, then there is no grounds for mistrial, and that's the initial question that's got to be decided by the Court, and never was.

I think that's it, your Honor. Thank you.

THE COURT: All right.

MR. PAULDING: Your Honor, as I'm sure you would expect, the State's picture is certainly going to be painted a little bit differently on what took place and what the Court should be focusing on at this time.

For the record, in all of the pretrial discussions with Ms. Charbonneau, it was hopefully or at least I had thought drummed home to her consistently to re-

spond to the questions as they are asked and not to volunteer information. There's no inciting to do such a thing on my part or anyone who works for me. I think that that issue can be addressed quite -- quite simply with the fact that if she was not being responsive to the question all counsel had to do was look at your Honor and say I would ask that she be told to respond to only the questions, and he said nothing. He kept going and kept going and kept allowing her to say what she was saying, and then, boom, we had the question that we had. None of that was coached on my part or anybody on the State's part.

But I think from Mr. Clifford's standpoint, and from the defense standpoint, it's obvious from today and from past situations, obviously I know that he wants to address the question of the Motion in Limine. He has wanted to for some

time. That's been known for some time. And I know that he wanted to pose the argument that he just made today to your Honor, and that's understood. It's also understood that -- that what he is posing is the defense prospective on the case devoid of any Court ruling on the Motion in Limine, on the evidentiary areas that he wished to probe, and it's devoid of any counter argument by the prosecution.

The question at this point, and the question which existed prior to Mr. Clifford's question to Michelle Charbonneau about being pregnant and getting money for an abortion, that question was never resolved. And that question is, is it permissible, not really admissible, is it permissible for the defense to cross-examine with that kind of question, with the kind of questions which would follow, and to probe into an evidentiary

area which contrary to Mr. Clifford's assertions, is quite possibly going to be barred by the Rape Shield Statute.

There's an extremely good, strong, and I think persuasive argument that I was intending to make, (a) on the rape Shield Statute on its face, (b) on its interpretation, and (c) on the legislative history of that stuatue, which I was all prepared to do, and I'd do it right now except that's not what we're here to decide.

And if your Honor had decided that the Rape Shield Statute did bar such evidentiary inquiries, then I think Mr. Clifford would have known -- obviously he has integrity, he would have not posed that question, because your Honor would have already ruled we're not going to allow this. And if your Honor had said we are going to allow it then the question would have gone; were you pregnant, did

you ask for the abortion. But this is not what we're talking about here. What we're talking about is the fact that these areas were outlined in advance.

There was express statements, which the transcript bears out, that the court would not be blindsided, and this is all in the brief that I submitted, that the court would not be blindsided, that the intent here was to alert the court and that there would be proper notice of this prior to entering into one of these areas. And I don't really for a moment think, that there was any intent on Mr. Clifford's part to controvert his previous statements. I think the heat of the battle, the heat of the moment is what we're talking about here. I mean the question, the situation posed itself and he asked the question.

The problem then is this: In light of his prior assertions and his prior statements to the court, can that particular question containing the prejudicial and inflammatory language that it contains be somehow smoothed over by a curative instruction or an instruction to disregard it. And I think your Honor did say quite clearly in the transcript that that had been something that you had considered before ruling on the mistrial. That is a proper area of inquiry for the court, in ruling whether or not the mistrial should be declared, and I think that the court was correct in its ruling in that the question containing such damaging assertions -- even if we had had the argument, even if your Honor had ruled that the question does not have to be answered, that question is going to linger in the minds of those jurors, and despite any

instruction to the contrary is going to have a terrible affect on their impartiality in the case.

So the question here today is not was the question aimed at veracity and, therefore, outside the bounds of the rape Shield Statute, the question that the court has to decide today is should the matter now be dismissed on Double Jeopardy grounds because of no finding of manifest necessity by the court in those words or not, or whether or not the ruling was proper. The State has maintained in its brief that the ruling was proper, that there was a very high degree of necessity for the mistrial being ordered, which is what Arizona v. Washington holds; not that the court has to find specifically manifest necessity and that, therefore, the State should be given its opportunity to try this case in front of a fair and im-

partial panel of jurors. And I think that's what we have to decide today. I could have spent a half hour objecting to the Motion in Limine and citing the Rape Shield law and other grounds such as probative value being outweighed by prejudicial affect and relevancy of things such as whether or not she allegedly had an abortion. That's not the point. We're not there yet. And I know Mr. Clifford wanted to make the argument, and I know he wanted to get into it, but he went about it the wrong way. And I feel that the way that that took place unfortunately constituted defense misconduct under our Practice Book and that a mistrial was properly declared.

And I think the Motion to Dismiss should be denied.

MR. CLIFFORD: May I respond just very briefly, your Honor.

I think it is exceptionally important that we keep in mind that that's not a question. The question directed to Ms. Charbonneau in the context of her testimony and is set forth in the Motion in Limine is not a question on whether or not she had an abortion. That has nothing to do with it. It happened to be incidentally the subject matter of her extortion, but it has nothing to do with a claim of prior sexual misconduct. The claim we had was she told two young men that she was pregnant and needed an abortion when, in fact, she was not pregnant. She obtained money from those young men and gave it to a third party and, as a matter of fact, the fact that she's not pregnant seems to me it takes it clearly out of any claim of sexual misconduct. And so that it is not a sexual misconduct question, it's a question as to veracity. Has she on another

occasion, or occasions, used a claim -- incidentally involving sex to extort money, get money and to give it to a third party, or to use it for other purposes other than what she told the witness it was for. That was one of the main threads of the defense of this case. We had testimony to indicate that she had gone out and talked to other people and I -- you know, that's way down the line.

All I can say is, your Honor, we had, under oath, sworn affidavits of people who would testify to that general theme of the defense.

By the way, if he was really concerned about the Rape Shield law, after the question was posed, the jury was excused, he could have argued that admissibility as to whether or not it was admissible, and your Honor could have ruled on it. The question was posed, and if your Honor

found that it was within the Rape Shield law, and it was an improper question, then I guess the Court could have taken whatever remedies it could. It could have instructed the jury, may be granted a mistrial, I don't know the answer to that.

But the mistrial cannot be granted just on the posing of a question. There's got to be a ruling on the admissibility. If it's admissible, then there can't be a mistrial. If it's not admissible, then the Court can decide what the remedies are.

I think that's all I have to say, your Honor. Thank you.

THE COURT: I think both parties will agree that it's the manifest policy of the law in the State of Connecticut today to protect the reputation of the complainant

as much as possible within the confines of the law, but without prejudice to the proper conduct of the defense case.

The mere filing of the Motion in Limine was a recognition of the damaging nature of the evidence that was sought to be brought forth. The Motion in Limine contains bald statements which if proven might allow a Court to allow that evidence in. On the other hand, if refuted based upon the general policy of the law to protect the reputation of the complainant such language might well have been excluded.

You are correct in saying that one of the main questions here was was the question admissible. That, however, was to be determined by a you yourself termed it an offer of proof in your opening statement, not in your statement here today, but at the trial.

That was the crux of the whole matter. That was the reason why the Court was to be alerted, so that there could be a hearing, there could be some determination as to whether or not there was any foundation for these bald accusations, which definitely would affect the character of any complaining witness.

The Court ruled that it was a mistrial based upon Section 888, and I believe it was of the Practice Book. The Court used the language of the Practice Book finding irreparable damage here and misconduct on the part of the defense counsel.

Now, this misconduct the Court refers to, the Court does not indicate to Mr. Clifford that it was premeditated misconduct in that sense. As you yourself said

the Court believes it was in the heat of battle, but it does amount within the purview of the Practice Book to misconduct.

The Court, therefore, feels that its declaration of a mistrial, after having considered the alternatives, was entirely proper. Not that it's necessarily appropriate here nor part of the Court's decision. The Court's decision is made. The Motion to Dismiss is denied.

If ever there was any proof of the correctness of the Court's decision it would have to be what the Court observed taking place in the corridors here among the jury panel after this incident.

Now we have a Motion to Disqualify the Jury Panel.

MR. CLIFFORD: Well, your Honor, can I have an exception to the Court's ruling.

THE COURT: Exception is noted, yes.

MR. CLIFFORD: Thank you.

THE COURT: It's your Motion to Disqualify the Jury Panel, Mr. Paulding?

MR. PAULDING: Yes, I'd basically rest on the motion. I would think perhaps defense might even concur in the motion.

MR. CLIFFORD: Well, let me indicate to the Court as I've indicated before under the Doctrine of Abney v. United States. We have decided to appeal this decision, your Honor. I will file those appeal notices before the end of the week, which may --

MR. PAULDING: It probably renders the motion mute most likely.

MR. CLIFFORD: Yeah, I think it probably renders that mute, your Honor.

THE COURT: Well, the Court will rule that the panel is disqualified in any event.

MR. CLIFFORD: I have no problem with that. Thank you, your Honor.

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NO. CR13-850060443 : SUPERIOR COURT

STATE OF CONNECTICUT : G.A. 13

v. : AT ENFIELD

MARK AUTORINO :

DEFENDANT'S MOTION TO DISMISS
FILED ON SEPTEMBER 10, 1986

MOTION TO DISMISS

Defendant, Mark Autorino, pursuant to Section 815(6) of the Practice Book, moves to dismiss the above information and to bar subsequent prosecution in accordance with the Double Jeopardy Clause of the Constitution of the United States and sets forth his grounds as follows:

1. A jury in the above matter was selected by the conclusion of September 5, 1986 and sworn in on September 9, 1986.

2. The testimony was commenced and the first witness sworn in at approximately 12:25 P.M. on September 9, 1986.

3. A defendant is viewed as in jeopardy when the jury is sworn in to begin hearing evidence in the case, or when the first prosecution witness is sworn when the case is tried to the court without a jury.

Serfass v. United States, 420 U.S. 377 (1975); United States v. Velasquez, 490 F.2d 29 (2d cir. 1983).

4. Upon conclusion of the direct testimony of the complaining witness, the cross-examination of the complaining witness was commenced and proceeded to a point where the complaining witness, in a totally unresponsive answer, testified that the defendant (who had not testified) was lying and was lying to his wife (also present in the court room.)

5. The defendant, by his counsel, then commenced to cross-examine the witness as to a specific act of misconduct which evidenced a lack of veracity. Martyn v. Donlin, 151 Conn. 402, 408, 198 A.2d 700 (1964); Vogel v. Sylvester, 148 Conn. 666, 675, 174 A.2d 122 (1961).

6. The thrust of this part of the cross-examination was to question the witness concerning her receiving money from Stephen Gorman for an abortion when, in fact, she was not pregnant, and gave the money to her boyfriend. This line of questioning was clearly and succinctly outlined prior to trial in defendant's Motion in Limine.

7. This line of questioning was not related to prior sexual misconduct but was directed to her veracity whereby she made a false claim to receive money. This non-sexual nature of the question is obvious since she was not, in fact, pregnant. Whatever history she may have in regard to abortion or abortions was not the focus of this question as is claer from the Motion in Limine (p.2 thereof).

8. Upon the posing of this line of questioning, the prosecutor, as recalled by the undersigned, (a portion of the transcript has been ordered), in the presence of the jury, moved for mistrial prior to objection and ruling on admissibility of the pending question by the court.

9. The jury was removed and without a finding of manifest necessity and over the objection of defendant, the court declared a mistrial.

10. The court, prior to the entry of the mistrial, did not consider alternatives short of declaring a mistrial, e.g. a cautionary instruction to the jury which is the normal remedy for what the court deems to be an improper question or testimony; more important, the mistrial was declared before a ruling on the propriety of the question.

11. In short, the declaration of a mistrial in this case, without prior adjudication of the propriety of the question or ruling out alternative solutions short of a mistrial, has deprived the defendant of his "valued right to have his trial completed by a particular tribunal." See United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547 (1971); United States v. Sommerville, 410 U.S. 458, 93 S.Ct. 1066 (1973); Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824 (1978).

Wherefore, the defendant, for the reasons outlined above, moves for a dismissal of the above information pursuant to the guarantees of the Double Jeopardy Clause of the Constitution of the United

States.

Respectfully submitted,
DEFENDANT

By Thomas D. Clifford
Skelley, Clifford,
Vinkels, Williams and
Rottner
His Attorneys

Filed September 10, 1986

ORDER

WHEREFORE, the foregoing Motion to Dismiss, having been filed and heard, it is hereby

ORDERED, that the Motion to Dismiss is DENIED.

BY THE COURT

Hale, Judge

Dated September 17, 1986

APPEAL

In the above entitled action the Defendant Mark Autorino hereby appeals to the

Appellate Court.

By Thomas D. Clifford
12 Charter Oak Pl.,
Hartford, CT 06106

Dated September 22, 1986
